



REPORT OF THE ADJUDICATOR

WASPA Members: Mobimex and Mira Networks

Service Type: Automatic subscription / spam

Complaint Number: 5602

Adjudicator: Kerron
Edmunson
Kerron Edmunson

Code and Ad Rules: v6.2 read with v2.3 of the Ad Rules

Introduction

This complaint was submitted by an individual who did receive a refund on making his complaint, but his complaint “is beyond the R300 odd that they took from me without my consent. My complaint is that they are defrauding the public and as a watch dog for the industry WASPA needs to put an end to it. How many poor people have they automatically subscribed without their consent or knowledge. How can they deduct money from my Vodacom account without any consent.”

Complaint

The complainant claimed to have been billed by a WASPA member without having subscribed to any services, and therefore to not have consented to the deductions made from his bank account by Vodacom. Specifically the complainant stated that he was “unknowingly subscribed to African Music Portal” by Mobimex without consent, an amount of R30 per week was being deducted from my Vodacom account – Please unsubscribe, provide proof of subscription and/or refund”. The later correspondence from the complainant is set out in the introduction above.

SP Response

Mobimex unsubscribed the subscriber and Mira Networks offered a full refund.

In response to the WASPA complaints notice, the SP stated merely that “the customer was subscribed on 23rd of October and unsubscribed on 8th of January. He will get refunded the money”. No formal response was forthcoming.

On further enquiry by this adjudicator, Mobimex attached billing logs and MO history for the complainant MSISDN. It would appear from this correspondence (on the SP’s version) that the complainant “tried to discontinue the subscription at the same day he/she subscribed, but instead of proper “STOP” keyword, “613” – was the content of the SMS the member sent. Our system did not recognise it as proper STOP. It is clearly said in the free notification message, welcoming the customer to our services, that in order to unsubscribe they only need to reply “STOP”. For that reason the termination of subscription was at later time and has been terminated upon request.”

Consideration of the WASPA Code

This is a serious complaint, and regardless of the refund made by the SP, I agree that the automatic subscription should be examined in more detail.

Within the context of the Code, there are several sections that apply. The first refer to the type of message and service by definition:

- **Section 2.8:** a “**commercial message**” is defined as is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.
- **Section 2.11:** a “**content subscription service**” is any subscription service providing or offering access to content including, by way of example only and not limitation: sound clips, ring tones, wallpapers, images, videos, games, text or MMS content or information. This includes any subscription service which describes itself as a “club” or which otherwise allows access to content to subscribers, at a cost which includes both a subscription element and a per content item element. Services which are not considered to be content subscription services include: dating services, chat services, location-based services, GSM terminal device services, corporate application services, reminder services, synchronisation applications, corporate communications applications, VOIP, etc.
- **Section 2.23:** a “**subscription service**” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

The second section deals with customer relations, and specifically the provision of information to customers, and privacy and confidentiality:

- **Section 4.1.4:** Members must make the terms and conditions of any of their services available to customers and potential customers, on request.
- **Section 4.2.1:** WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications.

The relevant sections within section 5 (sending of commercial communications) are as follows:

- **Section 5.1.2:** any message originator must have a facility to allow the recipient to remove his or herself from the message originator’s database, so as not to receive any further messages from that message originator.
- **Section 5.1.3:** where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be ‘STOP’.
- **Section 5.2:** this section deals with the identification of spam, and states at 5.2.1 that “Any commercial message is considered unsolicited (and hence spam) unless:
(a) the recipient has requested the message;
(b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would

reasonably expect to receive marketing communications from the originator;
or
(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so".

Section 11 is similarly relevant, and provides that in relation to subscription services:

- **Section 11.1.2:** Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item.
- **Section 11.1.7:** Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:
 - (a) The name of the subscription service;
 - (b) The cost of the subscription service and the frequency of the charges;
 - (c) Clear and concise instructions for unsubscribing from the service;
 - (d) The service provider's telephone number.
- **Section 11.1.8:** A monthly reminder SMS must be sent to all subscription service customers containing the following information:
 - (a) The name of the subscription service;
 - (b) The cost of the subscription service and the frequency of the charges;
 - (c) The service provider's telephone number.
- **Section 11.1.9:** The monthly reminder SMS must adhere to the following format:
 - (a) The monthly reminder must begin with either "Reminder: You are a member of NAME OF SERVICE" or "You are subscribed to NAME OF SERVICE".
 - (b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider's telephone number.

It is also relevant to consider the introduction to the Code which sets it in context.

- **Section 1.2** states that "the primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made."

The following conclusions can be drawn:

1. the first message received by the complainant was a commercial message for the purposes of subscribing the complainant to a subscription service;
2. thereafter the complainant received 12 messages from the SP;
3. the messages were in effect spam unless the complainant had himself agreed with Vodacom to receive marketing messages from Vodacom's own service providers, which might include the SP, although it is not clear that agreeing to receive marketing messages would also signify

agreement to join subscription services and for purposes of this adjudication we assume it does not;

4. the SP complied with section 5.1;
 5. the customer did not intend to join a subscription service, and was in fact trying to unsubscribe, albeit unsuccessfully;
 6. because of the light response received from the SP it is not clear whether the SP complied with sections 11.1.7, 11.1.8 or 11.1.9 and so we must assume they did not; and
 7. the SP accepted that the customer did not want to subscribe and refunded all monies deducted over the period October 2008 to January 2009.
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Decision

It is clear that it is in fact a requirement of the Code that it be possible for a message recipient to unsubscribe using certain words (the Code suggests that any of stop, end, unsubscribe or quit should be accepted). The SP notes that it did receive an SMS from the complainant on subscription but that it did not say "stop".

The SP has not responded to the allegation in any detail and so assumptions regarding the service offered by the SP, manner of contacting the complainant and complainant's desire to subscribe must all be judged on the complainant's version.

This being the case, I find that the SP was in breach of all of sections 4.2, 5.2, and 11.1.

Sanction

WASPA's Code plays a critical role in the self-regulation of an industry which is becoming daily more prolific in its output. The protection of consumers should be uppermost in the minds of industry participants. I consider each breach to be serious, and the SP's response to be inadequate to limit or avoid liability.

Therefore:

1. The SP is directed to pay a fine to WASPA in relation to the breaches of each of sections 4.2, 5.2 and 11.1 of R5,000 per breach, all within 10 days of the date of publication of this adjudication.
2. The SP is further directed to amend its commercial communications by SMS, to comply with section 11, and shall confirm this has been done in writing to WASPA within 30 days of the date of publication of this adjudication.